[2016] UKUT 0478 (TCC)

Reference number: FS/2016/002

FINANCIAL SERVICES–Decision Notice refusing variation of permission to allow carrying on of credit broking debt adjusting debt counselling and debt administration activities – whether applicant will satisfy and continue to satisfy the threshold conditions-extent of Tribunal's jurisdiction-whether matter should be remitted for reconsideration in the light of Tribunal's findings-no-reference dismissed-ss 55B, 55Z3, 133 and para 2C and 2E FSMA 2000

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DR SAIM KÖKSAL T/A ARCIS MANAGEMENT CONSULTANCY **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **Respondent**

TRIBUNAL: **Judge Timothy Herrington**
Jo Neill
Sandi O'Neill

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 15 and 16 September 2016

The Applicant in person

Mark Fell, Counsel, instructed by the Financial Conduct Authority, for the Respondent

DECISION

Introduction

1. On 22 December 2015 the Financial Conduct Authority ("the Authority") gave a decision notice (the "Decision Notice") to the Applicant ("Dr Köksal") refusing his application ("the Variation Application") to vary his existing Part 4A permission to include the regulated activities of credit broking, debt adjusting, debt-counselling and debt administration. By a reference notice dated 16 January 2016 Dr Köksal referred the matter to the Tribunal.

2. In summary, in the Decision Notice the Authority decided that it cannot ensure that Dr Köksal will satisfy, and continue to satisfy, in relation to the additional regulated activities for which permission is sought, the threshold conditions for authorisation ("the Threshold Conditions") set out at Schedule 6 to the Financial Services and Markets Act 2000 ("FSMA"). The Authority decided that the Variation Application was incomplete when it was initially made by Dr Köksal. The Authority contends that it has made repeated requests to Dr Köksal for further information, but Dr Köksal has failed to provide adequate information. In relation to the effective supervision Threshold Condition (in paragraph 2C of Schedule 6 FSMA) the Authority is not satisfied that Dr Köksal can be effectively supervised. In relation to the suitability Threshold Condition (in paragraph 2E of Schedule 6 FSMA) the Authority is not satisfied that Dr Köksal is fit and proper, having regard to all the circumstances.

3. Dr Köksal disputes these findings. He contends that the Authority has never been clear and transparent in their communications and has asked the same irrelevant questions many times repeatedly during the process of his application. He denies that his application was incomplete and that he did not provide satisfactory responses or substantive information in response to the Authority's requests. He contends that he will satisfy the Threshold Conditions and that he protects his clients and poses no risk to consumers.

4. Dr Köksal had applied in his reference notice for a direction (the "Suspension Application") that the effect of the Decision Notice, which was to terminate the interim permission held by Dr Köksal to carry on the regulated activities referred to at [1] above, be suspended pending the determination of this reference pursuant to rule 5 (5) of the Tribunal Procedure (Upper Tribunal) Rules 2008. On 22 April 2016 the Tribunal released a decision dismissing that application, which we refer to in this decision as the "Suspension Decision."

Relevant Law and Guidance

5. Part 4A FSMA contains (in sections 55A to 55G) provisions relating to applications for permission to carry on a regulated activity, and (in sections 55A to 55KA) provisions relating to the variation or cancellation of such permissions.

6. In this case, we are concerned with s 55H FSMA which provides for an application to the Authority by an authorised person who has a Part 4A permission for variation of permission to, among other things, add a regulated activity. Prior to making the application which is the subject of this reference, Dr Köksal had an existing Part 4A permission relating to the carrying on of regulated activities relating to insurance mediation.

7. Before April 2014, firms carrying on consumer credit activities were authorised and regulated by the Office of Fair Trading ("OFT") under a licensing system provided for by the Consumer Credit Act 1974. Firms carrying on "ancillary credit businesses", a category which included credit brokerage, debt adjusting, debt-counselling and debt administration, were required to obtain an OFT licence before carrying on those activities.

8. Parliament decided in 2013 to transfer responsibility for the regulation of the consumer credit industry to the Authority. The Authority published a consultation paper setting out its detailed proposals for its regulation of consumer credit in October 2013. The transfer of responsibility for the regulation of the consumer credit industry from the OFT to the Authority took effect on 1 April 2014. This transfer was effected in legislative terms by specifying various consumer credit activities as regulated activities for the purposes of the general prohibition in s 19 FSMA and the requirement for a permission in s 20 FSMA. Consequently, as from 1 April 2014 a firm which was not at that time an authorised person under the Act requires the appropriate permissions under Part 4A of the Act before it can lawfully carry on consumer credit regulated activities and a firm which was an authorised person (such as Dr Köksal) requires to vary its Part 4A permission so as to include within its scope the relevant consumer credit activities which it wishes to carry on in order to avoid contravening the provisions of s 20 of the Act.

9. As explained in the Suspension Decision, pursuant to transitional provisions a firm, which immediately before 1 April 2014 held an OFT licence in respect of consumer credit activities, acquired on 1 April 2014 an interim permission to carry on as regulated activities the consumer credit activities that were covered by its OFT licence without the Authority having to undertake any consideration as to whether the firm concerned met the Threshold Conditions. This was subject to the firm having notified the Authority that it wished to have an interim permission. However, the effect of the transitional provisions is that a firm would lose its interim permission unless (in the case of a firm such as Dr Köksal which already held a Part 4A permission for other regulated activities) it applied by a date specified by the Authority for a variation of its existing Part 4A permission to include the activities covered by the interim permission. The Authority could only grant the variation if it was satisfied that the firm met the Threshold Conditions in relation to the activities concerned.

10. The consumer credit activities referred to at [7] above are now regulated by the Authority by virtue of having been specified as regulated activities under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the

"RAO"). We deal at [35] below with how those activities are now defined in the RAO.

11. Section 55B (3) FSMA provides, among other things, that in varying a Part 4A permission the Authority must ensure that the applicant will satisfy, and continue to satisfy, in relation to all of the regulated activities for which the person has or will have permission, the Threshold Conditions for which the Authority is responsible.

12. The Threshold Conditions which are relevant to this reference are condition 2C and condition 2E.

13. Condition 2C so far as relevant provides:

> "(1) A must be capable of being effectively supervised by the FCA having regard to all the circumstances including-
>
> (a) the nature (including the complexity) of the regulated activities that A carries on, or seeks to carry on;
>
> (b) the complexity of any products that A provides or will provide in carrying on those activities;
>
> (c) the way in which A's business is organised;
>
> …
>
> …"

14. Condition 2E provides, so far as relevant:

> "A must be a fit and proper person having regard to all the circumstances, including-
>
> (a)…
>
> (b) the nature (including the complexity) of the regulated activities that A carries on or seeks to carry on;
>
> (c) the need to ensure that A's affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers and the integrity of the UK financial system;
>
> (d) whether A has complied and is complying with requirements imposed by the FCA in the exercise of its functions, or requests made by the FCA, relating to the provision of information to the FCA and, where A has so complied or is so complying, the manner of that compliance;
>
> (e) whether those who manage A's affairs have adequate skills and experience have acted and may be expected to act with probity;
>
> (f) whether A's business is being, or is to be, managed in such a way as to ensure that its affairs will be conducted in a sound and prudent manner;
>
> …"

15. That part of the Authority's Handbook known as COND gives guidance on how the Authority interprets the Threshold Conditions.

16. In relation to condition 2C the guidance states that in considering whether a firm is capable of being adequately supervised the Authority will, among other things, consider whether it is likely that the Authority will receive adequate information from the firm to determine first whether the firm is complying with the requirements and standards under the regulatory system for which the Authority is responsible and secondly to identify and assess the impact on its statutory objectives. This will include consideration of whether the firm is ready, willing and organised to be open and cooperative with the Authority and the Authority's requirements regarding the provision of information to the Authority.

17. In relation to condition 2E, the Authority will have regard to the firm's plans to seek to vary its Part 4A permission to carry on additional regulated activities as well as to whether the firm has been open and cooperative in all its dealings with the Authority and is ready, willing and organised to comply with the requirements and standards under the regulatory system.

18. Section 55Z3(1) FSMA provides that an applicant who is aggrieved by the determination of an application made under Part 4A FSMA may refer "the matter" to the Tribunal.

19. Section 133 FSMA contains some general provisions regarding proceedings before the Tribunal.

20. Section 133 (4) FSMA provides that, on a reference, the Tribunal may consider any evidence relating to the subject matter of the reference whether or not it was available to the decision-maker at the material time. It is well understood that a reference is not an appeal against the Authority's decision but a complete rehearing of the issues which gave rise to the decision.

21. Section 133(5) to (7) FSMA provide as follows:

> "(5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal-
>
> (a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter, and
>
> (b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal consider appropriate for giving effect to its determination.
>
> (6) In any other case, the Tribunal must determine the reference or appeal by either-
>
> (a) dismissing it; or

(b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.

(6A) The findings mentioned in subsection (6) (b) are limiting to findings as to-

(a) issues of fact or law;

(b) the matters to be, or not to be, taken into account in making the decision; and

(c) the procedural or other steps to be taken in connection with the making of the decision.

(7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal."

22. The "decision-maker" in relation to this reference is the Authority.

23. It is common ground that this reference is not a "disciplinary reference" and accordingly the Tribunal's powers in determining the reference are limited to those prescribed by s 133 (6) and (6A) FSMA.

24. The approach to be taken in the exercise of these more limited powers was considered by the Tribunal in *Carrimjee v FCA* [2015] UKUT 0079 (TCC) where the Tribunal said this at [57] and [58]:

> "57. Let us suppose that in this reference we were to find that Mr Carrimjee's behaviour was perfectly acceptable and did not constitute a breach of a Statement of Principle. In these circumstances it would be clearly open to the Tribunal to indicate that there was only one rational answer as to how the question of withdrawal of approval and imposition of a prohibition order should be determined because to prohibit and withdraw approvals in these circumstances would be unlawful as an irrational decision, and any further decision made by the Authority would be capable of being referred to the Tribunal.
>
> 58. The position is more complicated if the Tribunal were to decide that there was a degree of culpability on Mr Carrimjee's falling short of failing to act with integrity but that it constitutes a failure to act with due skill, care and diligence. In these circumstances, if the reference had been made before 1 April 2013, the Tribunal may have decided to impose a financial penalty, and would also decide whether it was appropriate to withdraw any approval under section 63 or make any kind of prohibition order under section 56 and, if so, the scope of such order. Now that decision can only be made by the Authority. However, in our view it would be open to the Tribunal to make a finding as to whether, in the light of the findings of fact it had made the withdrawal of any approval or the making of a prohibition order, or a prohibition order of limited scope, would be disproportionate; or was one that no reasonable authority, properly directing itself as to the law, could have made. This would be a finding of law which is open to the Tribunal under section 133(6) A. However, if the Tribunal was of the view that as a matter of law a withdrawal of approval or a prohibition order of a specified description was within the range of reasonable decisions which the Authority could make, then it is not open to the Tribunal itself to determine what the appropriate action is for the Authority to take, that is a matter for the Authority alone."

25. That case of course concerned the imposition of a prohibition order, but in our view the principles to be applied are the same in a case such as the present one, which relates to the question of whether the Authority can be satisfied that if the Variation Application were granted Dr Köksal would satisfy the Threshold Conditions.

26. In our view it is clear from the passages from *Carrimjee* quoted above that the Tribunal approached its jurisdiction on the basis that ultimately the decision it would be required to make was whether the decision made by the Authority to impose a prohibition order was one which was within the range of reasonable decisions open to it. The Tribunal will make that assessment in the light of the evidence put before it on the reference and any findings of fact and law that it makes in relation to that evidence. So, in relation to that case, the Tribunal decided that in the light of its finding that Mr Carrimjee had not acted without integrity, the decision previously made by the Authority that he should be prohibited on that basis could no longer be within the range of reasonable decisions open to the Authority. The Tribunal therefore had to remit the decision to prohibit to the Authority for further consideration in the light of the Tribunal's findings that Mr Carrimjee's culpability was of a lesser degree than that previously found by the Authority and on which it had based its decision to prohibit.

27. Following that approach in this case, if, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to refuse the Variation Application is one that is reasonably open to the Authority then the correct course is to dismiss the reference.

28. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter back to the Authority with a direction to reconsider the decision in the light of those findings.

29. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority and which formed the basis of its decision.

30. In relation to s 133 (4) FSMA Mr Fell submits that the "subject matter of the reference", as referred to in that provision, is to be regarded as the question whether the Authority was satisfied that if the Variation Application were granted the Threshold Conditions would be met and accordingly the only matters that may be considered in that regard are the circumstances which led up to the Authority's determination of the application, and not any subsequent events, although it was open to the Tribunal to consider evidence that related to the circumstances leading up to the determination even if it was not available at the time the decision was made.

31. We reject those submissions for the following reasons. Section 55Z3(1) FSMA, which has not been altered since originally enacted, permits a person who is aggrieved by a decision not to approve an application to vary a Part 4 A permission to refer "the

matter" to the Tribunal. In our view it is clear that in this context "the matter" in question is whether the Authority can be satisfied that if the Variation Application were approved Dr Köksal would satisfy the Threshold Conditions. Consequently, the extent of what the Tribunal may examine in considering the matter referred will be prescribed by the issues raised in the pleadings and the evidence sought to be adduced to support the competing contentions made by the parties in those pleadings.

32. In this case, Dr Köksal disputes that the Variation Application was incomplete and he contends that he has supplied sufficient information on which the Authority can make its decision. In certain respects, he relies on information that he has provided since the Authority's decision on the Application. In our view there is nothing in FSMA which indicates that Dr Köksal may only rely on the circumstances which prevailed at the time the Authority gave him the Decision Notice, and in particular nothing to suggest that s 133 (4) should be limited in its scope in the manner in which Mr Fell submits.

33. In our view there is nothing in principle that would prevent us taking into account the further information provided by Dr Köksal since the giving of the Decision Notice in coming to a decision as to whether or not to remit the matter back to the Authority in the light of the findings that we make in relation to that evidence. In our view to take this course is entirely consistent with the wording of both s 55Z3 (1) and s 133 (4) FSMA. It is also consistent with the approach taken by this Tribunal in the case of *Stephen Robert Allen v The Financial Services Authority (*2013) FS/2012/0019 where the Authority sought to substitute new and distinct allegations which it contended established that Mr Allen was not a fit and proper person from those originally contained in its decision notice. The Tribunal said this at [19] of its decision:

> "The allegation in the Decision Notice was that Mr Allen is not a fit and proper person to perform any function in relation to regulated activities generally the because he lacks honesty and integrity. Any evidence that relates to Mr Allen's honesty and integrity, whether or not it was available to the Authority at the time of the Decision Notice, may be considered by the Upper Tribunal."

Although this decision pre-dates the coming into force of s 133 (6) and (6A) FSMA we see nothing in the new provisions which would affect it.

34. We are therefore of the view that if we were to make findings of fact in relation to the new evidence provided by Dr Köksal which indicated that the original findings made on which the decision was based had been overtaken by further developments, such as new evidence which clearly demonstrated that in substance the further information requested by the Authority in relation to the Application had in fact now been provided, then that finding could lead the Tribunal to conclude that the matter should be remitted to the Authority for further consideration in the light of those findings. This would ensure that the Authority reconsidered its decision on a fully informed basis.

35. We set out as follows the definitions, so far as relevant, contained in the RAO of the relevant activities for which Dr Köksal seeks the variation of his Part 4A permission:

"**36A.— Credit broking**

(1) Each of the following is a specified kind of activity—

(a) effecting an introduction of an individual or relevant recipient of credit who wishes to enter into a credit agreement to a person ("P") with a view to P entering into by way of business as lender a regulated credit agreement (or an agreement which would be a regulated credit agreement but for any of the relevant provisions);

(b) effecting an introduction of an individual or relevant recipient of credit who wishes to enter into a consumer hire agreement to a person ("P") with a view to P entering into by way of business as owner a regulated consumer hire agreement or an agreement which would be a regulated consumer hire agreement but for article 60O (exempt agreements: exemptions relating to the nature of the agreement) or 60Q (exempt agreements: exemptions relating to the nature of the hirer);

(c) effecting an introduction of an individual or relevant recipient of credit who wishes to enter into a credit agreement or consumer hire agreement (as the case may be) to a person who carries on an activity of the kind specified in sub-paragraph (a) or (b) by way of business;

(d) presenting or offering an agreement which would (if entered into) be a regulated credit agreement (or an agreement which would be a regulated credit agreement but for any of the relevant provisions);

(e) assisting an individual or relevant recipient of credit by undertaking preparatory work with a view to that person entering into a regulated credit agreement (or an agreement which would be a regulated credit agreement but for any of the relevant provisions);

(f) entering into a regulated credit agreement (or an agreement which would be a regulated credit agreement but for any of the relevant provisions) on behalf of a lender.

(2) Paragraph (1) does not apply in so far as the activity is an activity of the kind specified by article 36H (operating an electronic system in relation to lending).

(3) For the purposes of paragraph (1) it is immaterial whether the credit agreement or consumer hire agreement is subject to the law of a country outside the United Kingdom.

(4) For the purposes of this article, the "relevant provisions" are the following provisions—

(a) article 60C (exempt agreements: exemptions relating to the nature of the agreement);

(b) article 60D (exempt agreements: exemptions relating to the purchase of land for non-residential purposes);

(c) article 60E (exempt agreements: exemptions relating to the nature of the lender), except for paragraph (5) of that article;

(d) article 60G (exempt agreements: exemptions relating to the total charge for credit);

(e) article 60H (exempt agreements: exemptions relating to the nature of the borrower)."

39D.— Debt adjusting

(1) When carried on in relation to debts due under a credit agreement—

(a) negotiating with the lender, on behalf of the borrower, terms for the discharge of a debt,

(b) taking over, in return for payments by the borrower, that person's obligation to discharge a debt, or

(c) any similar activity concerned with the liquidation of a debt,

is a specified kind of activity.

(2) When carried on in relation to debts due under a consumer hire agreement—

(a) negotiating with the owner, on behalf of the hirer, terms for the discharge of a debt,

(b) taking over, in return for payments by the hirer, that person's obligation to discharge a debt, or

(c) any similar activity concerned with the liquidation of a debt,

is a specified kind of activity.

39E.— Debt-counselling

(1) Giving advice to a borrower about the liquidation of a debt due under a credit agreement is a specified kind of activity.

(2) Giving advice to a hirer about the liquidation of a debt due under a consumer hire agreement is a specified kind of activity.

39G.— Debt administration

(1) Subject to paragraph (3), taking steps—

(a) to perform duties under a credit agreement or relevant article 36H agreement on behalf of the lender, or

(b) to exercise or enforce rights under such an agreement on behalf of the lender,

is a specified kind of activity

(2) Subject to paragraph (3), taking steps—

(a) to perform duties under a consumer hire agreement on behalf of the owner, or

(b) to exercise or enforce rights under such an agreement on behalf of the owner,

is a specified kind of activity.

(3) Paragraphs (1) and (2) do not apply in so far as the activity is an activity of the kind specified by article 36H (operating an electronic system in relation to lending) or article 39F (debt-collecting).

(4) In this article, *"relevant article 36H agreement"* means an article 36H agreement (within the meaning of article 36H) which has been entered into with the facilitation of an authorised person with permission to carry on a regulated activity of the kind specified by that article."

36. The Tribunal made observations on these provisions in the Suspension Decision which are reproduced here as follows:

> "28. As Mr Fell observed, all these activities are defined by reference to the concept of a "credit agreement". This is defined broadly in article 60B (3) of the RAO as "an agreement between an individual or a relevant recipient of credit ("A") and any other person ("B") under which B provides A with credit of any amount."

29. The concept of a "credit agreement" is different to the concept of a "regulated credit agreement" referred to in paragraph (1) (a) of the definition of "credit broking" as set out above. It is not necessary to set out in any detail the definition of "regulated credit agreement" except to say that a "credit agreement" will be a "regulated credit agreement" unless it is an "exempt agreement". It is not necessary to go into any detail here as to all the types of agreement that are exempt but, most relevantly in relation to this matter, an agreement under which the lender provides the borrower with credit exceeding £25,000 and where the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower is an exempt agreement: see article 60 B (3) and article 60 C (3) of the RAO.

30. Thus it can be seen that where a firm engages in any of the activities of credit broking, debt adjusting, debt counselling or debt administration then those activities will be regulated activities under the RAO and will therefore need to be covered by a Part 4A permission if they are to be lawfully carried on, regardless of the amount lent under the underlying credit agreement or the purpose for which the borrowing was sought. This is the result, in the case of credit broking, of including within its scope activities in relation to credit agreements that would have been regulated credit agreements but for the exemption in article 60 C relating to loans in excess of £25,000 provided for business purposes and, in relation to the other activities, including within their scope activities in relation to all types of credit agreement. The only credit agreements to be excluded from the scope of these activities are those where the borrower is a corporate body or a partnership or unincorporated association whose members are all corporate bodies, the latter two bodies not falling within the definition of "relevant recipient of credit" in article 60 B (3) of the RAO.

31. Thus it can be seen that a firm which carries on any of the ancillary credit businesses referred to above will find that those activities are regulated by the Authority unless the borrower under the underlying credit agreement is a corporate body or a partnership or unincorporated association all of whose members are corporate bodies.

32. I was referred at my instigation briefly to the provisions of that part of the Authority's Handbook known as CONC, which sets out the conduct of business requirements for those firms carrying out consumer credit related activities. I have also looked at CONC at a high level since the hearing and it is apparent from its provisions that the level of obligation on a firm carrying on ancillary credit businesses and consequently the level of consumer protection afforded to the customer does vary depending on, for example, whether the activity relates to a regulated credit agreement or whether the customer is an individual. The definition of "individual" is somewhat unusual and confusing in that as well as including a natural person it includes a partnership consisting of 2 or 3 persons not all of whom are bodies corporate and also an unincorporated

> body of persons which does not consist entirely of bodies corporate. So for example, in relation to credit broking, the requirement in CONC 2.5.3 to explain the key features of an agreement to a customer and to take reasonable steps to satisfy itself that the product it wishes to recommend is not unsuitable for the customer's needs and circumstances only applies where the agreement concerned is to be a regulated credit agreement. Therefore, although credit broking in relation to non-regulated credit agreements is a regulated activity, unless the firm's customer is an individual the requirement will not apply. Similarly, the financial promotion rules will only apply if the person to whom the services to be provided is an individual. Likewise, in the area of debt advice, where the Authority has particular concerns regarding standards of behaviour, the provisions in CONC relating to unfair business practices and appropriate advice will not apply unless the person to whom the services are provided is an individual."

37. As regards the burden of proof in matters of this kind, Mr Fell, correctly in my view, submitted that the legal burden of proof was on the Authority to demonstrate why it could not ensure that if the Application was granted Dr Köksal would not satisfy, and continue to satisfy, the Threshold Conditions. The Authority will satisfy this burden by explaining its reasons as to why that is the case. At that point, the evidential burden is on Dr Köksal to produce evidence from which the Tribunal can make findings of fact which in the Tribunal's view merit the Tribunal remitting the matter to the Authority for further consideration. This accords with the approach followed by the predecessor to this Tribunal in *David Thomas v FSA* (2004). That case concerned the refusal by the Authority of an application for approval of a controlled function by an individual. Section 61 (1) FSMA provides that the Authority may grant such an application "only if it is satisfied that the person in respect of whom the application is made is a fit and proper person to perform the functions to which the application relates…". The tribunal held at [99] that the Authority does not have to prove that the Applicant is not fit and proper but rather that it is not satisfied that the Applicant is fit and proper. In our view this principle is equally applicable to a reference relating to a refusal by the Authority to vary a firm's Part 4A permission.

38. As is the usual position in respect of references to this Tribunal, the standard of proof on any issue will be the usual civil standard of a balance of probabilities.

Evidence

39. Dr Köksal filed a witness statement on which he was cross-examined. The essence of this statement is that Dr Köksal and his staff have adequate experience to run his business effectively and efficiently and he concluded the statement by asking the Tribunal to "ignore the irrelevant concerns of the FCA regarding the "consumer protection" issue".

40. Although we regarded Dr Köksal as a truthful witness his evidence was often repetitive and rambling and on many occasions he failed to give relevant answers to the questions that were asked. His approach to Mr Fell was confrontational. He was repeatedly asked whether he had given the Authority the information that had been

requested a number of times in correspondence but his stock answer was that he had provided such information that he considered to be relevant and was critical of the application process and the manner in which the Authority had dealt with it.

41. Dr Köksal also relied on the evidence contained in the witness statements of two of his customers, Mr Gurgur and Mr Polat. The evidence in these witness statements effectively amount to a positive testimonial from each of the customers concerned as to the manner in which Dr Köksal dealt with his affairs. The Authority asked that Dr Köksal make these witnesses available for cross-examination but regrettably he failed to do so, notwithstanding the fact that the Tribunal's directions required witnesses to be made available for cross-examination if requested. In the circumstances, we have placed very little weight on the statements.

42. The Authority relied on a witness statement made by Mr Michael Baker, a Manager in the Credit Authorisations Division ("CAD") of the Authority, a role he has performed since June 2013. In his statement, Mr Baker provides an overview of regulation of the consumer credit industry and an overview of the Authority's approach to supervision, in particular with regard to small firms such as Dr Köksal's. Mr Baker then gives an overview of the Variation Application, a summary of the interactions between Dr Köksal and the Authority in relation to the Variation Application and the effect of those interactions on the assessment of the Variation Application. He also deals briefly with the numerous complaints submitted by Dr Köksal as to the manner in which he has been dealt with by the Authority.

43. In summary, Mr Baker concludes in his evidence that Dr Köksal has failed to provide specific information about his business activities over the course of an approximately 16-month period despite efforts to elicit that information through extensive correspondence and clear statements from the Authority that it considered such information pertinent to the assessment of the Application. In the absence of this information, Mr Baker's view is that the Authority's understanding of the firm's business remains limited and that there are sufficient grounds to conclude that the Authority is not able to be satisfied that Dr Köksal will satisfy, and continue to satisfy, the Threshold Conditions.

44. Dr Köksal did not wish to cross-examine Mr Baker. Accordingly, we have accepted Mr Baker's evidence in so far as it relates to factual matters. How those facts affect the Authority's conclusion that the Threshold Conditions are not satisfied is of course a matter for the Tribunal to consider in deciding whether or not to remit the matter for further consideration by the Authority.

45. We were also provided with two bundles of documents; one prepared by the Authority and one prepared by Dr Köksal. Although many documents appeared in both bundles, Dr Köksal's bundle contains some extra documents that were provided somewhat late in the process, although the Authority took no issue with that. Dr Köksal also provided some further evidence as regards his firm's business activities during the course of the hearing. The Authority did not object to the late admission of this material and due to its relevance and importance to the issues we have to consider it was admitted.

Findings of fact

Background to the Variation Application

46. Dr Köksal has been involved in financial services since 1989 and first obtained a consumer credit licence from the OFT covering certain ancillary credit businesses at that time. Dr Köksal has operated as a sole trader under the trading name of Arcis Management Consultancy since 1997, carrying on a management consultancy and finance brokerage business. When his consumer credit licence was renewed in November 2009 it covered credit brokerage, debt adjusting, debt counselling, debt administration and the provision of credit information services. Dr Köksal has sought to obtain a variation of his Part 4A permission to cover all of these activities save for the last mentioned. It appears that the focus of his business is on giving assistance to small and medium enterprises ("SMEs") and start-up businesses. Dr Köksal's evidence was that he has helped hundreds of clients with due diligence and care and that many of his new clients are referrals from existing clients. We have no reason to doubt this statement and the Authority makes no allegations in relation to the manner in which Dr Köksal's consumer credit business has been conducted, although as we shall see, the Authority had previously had concerns about the manner in which his regulated mortgage business was conducted.

47. On 9 November 2004 Dr Köksal was granted a Part 4 permission (now a Part 4A permission) by the Authority to carry on intermediary activities in relation to regulated mortgage contracts and non-investment insurance contracts. Dr Köksal had a number of years of experience of mortgage intermediary business prior to that time, having been registered by the Mortgage Code Compliance Board in respect of that business from 26 February 1998 up to the point at which mortgage regulation became the responsibility of the Authority in 2004.

48. On 16 February 2011 Dr Köksal was contacted by the Authority and discussions took place as to how his firm was ensuring customers were treated fairly. The Authority's overall assessment, as set out in a letter of the same date to Dr Köksal, was that it was not satisfied that Dr Köksal was in a position to demonstrate that consumers can be confident they are dealing with a firm where the fair treatment of customers is central to its culture. The letter stated that improvements were required to ensure all areas of the firm's business were working effectively to deliver fairer outcomes for customers. In particular, the letter strongly suggested that Dr Köksal give some thought to having a formal locum arrangement in place to ensure continuity of service and to assist in the delivery of fairer outcomes for customers. It does not appear that either Dr Köksal or the Authority took any specific action in relation to the matters raised in this letter, although, as described at [75] below, certain of the concerns expressed in this letter were relied on by the Authority when it decided in 2014 to refuse Dr Köksal's application to reinstate his firm's permission to carry on mortgage intermediation activities.

49. Until July 2011 Dr Köksal was on Barclays Bank PLC's panel of mortgage intermediaries. Dr Köksal was removed from the panel at that time because Barclays had rejected two mortgage applications intermediated through Dr Köksal. In

November 2011 Barclays filed a report with the Authority stating that in its view reasons existed to suspect that Dr Köksal was complicit in mortgage fraud. The report also stated that a case review had found poor quality submissions with five cases out of eight declined (two by reason of fraud) and that there were concerns regarding proof of applicants' income not being obtained before cases were submitted.

50. As a consequence of this report, the Authority decided to investigate whether there was any evidence of fraudulent activity at Dr Köksal's firm. Accordingly, the Authority made a supervision visit to Dr Köksal on 9 and 10 February 2012 and on 23 February 2012 the Authority sent Dr Köksal a letter detailing its findings. The letter stated that these findings had been discussed with Dr Köksal at a feedback meeting. The visit was limited to looking at Dr Köksal's mortgage business. The letter explained that the reason for the visit stemmed from information received from Barclays regarding Dr Köksal's removal from the panel and for that reason the Authority wished to assess whether the systems and controls Dr Köksal had in place were effective in reducing the risks of the firm being used to commit financial crime.

51. There has in fact never been any suggestion by the Authority that Dr Köksal himself or his firm has been complicit in any mortgage fraud. It is clear from the letter of 23 February 2012 that the concerns expressed by the Authority focused on systems and controls relating to the prevention of financial crime and the suitability of the firm's advice.

52. The letter stated that the Authority had identified a number of areas where the firm's practices fell way short of the standard that the Authority considered acceptable.

53. In relation to financial crime, the Authority concluded that Dr Köksal failed to ensure that his firm was organised so that it could identify and act upon obvious anomalies in false mortgage applications and help to prevent the firm being used by third parties to make mortgage applications on a fraudulent basis. In particular, the Authority found information relating to proof of income on the files that it reviewed which suggested that mortgage fraud had occurred. The Authority stated that the issues identified were those which it would reasonably expect any authorised firm to have identified and that the Applicant had not picked up. The Authority would expect the firm to be aware of the possibility of financial crime and to put in place processes to mitigate these risks, as well as being able to understand the implications of not doing so. There were also concerns that there was a high probability that a significant number of payslips that the Authority saw on file may not correspond with the actual income customers were paid.

54. As regards suitability of advice, there were concerns regarding the sufficiency of know your customer information held on file and the appropriateness of advice given with regard to interest only mortgages.

55. The overall conclusion of the Authority from the visit, as stated in the letter, was that there was a high risk that the firm was being used for financial crime, and there was not sufficient monitoring to help prevent this. As a result, the Authority invited

Dr Köksal to cancel the firm's mortgage permissions which would allow him to focus on the majority of his business which the Authority understood to be non-regulated commercial mortgages.

56. Dr Köksal agreed promptly to vary his permissions as requested. The letter concluded by stating that if Dr Köksal wished to reapply for regulated mortgage permissions in the future, he will need to satisfy the Authority that he can meet its current requirements for authorisation.

57. Dr Köksal subsequently stated, in the context of his application to reinstate his permission to carry out mortgage intermediary business which is described below, that he had asked the Authority to remove the permissions because, at the supervision visit, the Authority's supervision team "saw one penny difference between bank statements and payslips to be potential fraud, and he was scared of being victimised for something which had no material fact and truth in it." In a letter of complaint that Dr Köksal wrote to the then Acting Chief Executive of the Authority on 7 July 2015 Dr Köksal added a further reason. He said he asked the Authority to cancel the permission "in order not to be victimised by officers who have lack of knowledge of SMEs and private-sector world and small accountancy practices" and "because of the very scary comments in their feedback and in the subsequent letter."

58. It was clear in the hearing that Dr Köksal continues to harbour a burning resentment, if not outright anger, at what he regards as false information given by Barclays Bank to the Authority that he was complicit in mortgage fraud. This led to the supervision visit in February 2012 and the subsequent letter from the Authority referred to above. It appears that Dr Köksal has been unable to distinguish between the suggestion of complicity in fraud made in the Barclays' report and the actual findings of the Authority following the supervision visit. Those findings were limited to findings regarding what the Authority believed to be deficiencies in the systems and controls that Dr Köksal had in place to address the risks of his business being used for financial crime. Our assessment of the findings of the supervision visit in relation to the specific matters of concern, which Dr Köksal clearly regarded as trivial, was not that in themselves these discrepancies indicated conclusively that there had been mortgage fraud, but that the failure to notice discrepancies could lead to the business failing to spot potential mortgage fraud.

59. However, Dr Köksal formed the view that all the criticisms made by the Authority were unjustified and trivial and that the officers concerned were not competent to assess his own competence, bearing in mind what Dr Köksal regarded as his own superior knowledge and experience of the operations of small businesses like those of his clients. Dr Köksal has continued to hold this view right up to and during the hearing before us and has maintained in his submissions to the Tribunal his view that the officers concerned were largely ignorant and held subjective and "excessive" views on what amounted to suitable advice. These views, unfortunately, have coloured his whole approach to the matters which are the subject of this reference. As a result, he continues to hold the view that the concerns raised by the Authority following the supervision visit in 2012 were and continue to be unfounded and no improvements to his firm's systems and controls needed to be made as a result.

60. As mentioned at [8] above, in October 2013 the Authority set out in a consultation paper its detailed proposals for the regulation of the consumer credit industry when responsibility passed to it from the OFT in that regard. As Mr Baker said in his evidence, this document showed that firms were provided with an explanation, and the timescales of the change in regime from the OFT to the Authority. It was clear from these proposals that a much more rigorous approach to regulation would follow. In particular, it was made clear that all firms which currently held consumer credit licences from the OFT would have to demonstrate that they met the Threshold Conditions. They would need to provide a compliance plan and demonstrate their approach to financial crime. In addition, they would have to prepare and provide a regulatory business plan and demonstrate effective supervision; provide an explanation of the business processes undertaken regarding suitability, debt counselling and conflicts of interest and demonstrate an ethos of treating customers fairly. This was very much a step change from the existing regulatory system which in general terms was not characterised by any of these features.

61. In answer to a question from the Tribunal, Dr Köksal said that he had not appreciated the step change that resulted from the Authority's approach to the regulation of consumer credit activities until he attended a seminar organised by a compliance consultant in June 2016 and saw the slides that the consultant prepared, which highlighted the features of the new approach by the Authority, referred to at [59] above.

62. On 2 December 2013 Dr Köksal applied to vary his firm's Part 4A permission so as to include mortgage intermediary activities, that is the permission in that regard which he had voluntarily surrendered in 2012.

63. On 12 March 2014 the Authority wrote to Dr Köksal informing him that detailed rules for the FCA regime for consumer credit were now available on the FCA website and that he should familiarise himself with the new rules and prepare his business "now". In the light of our findings at [60] above and no evidence from Dr Köksal to the contrary, we assume that he took no steps following receipt of that letter to study the new requirements in any detail. In his oral evidence, he expressed the view that the requirements had not changed since he first obtained his consumer credit licence in 1989 and he observed that the information sent by the Authority provided no clarification as to the scope of regulation in relation to commercial lending. The letter also informed Dr Köksal that after 1 April 2014 his firm would have an interim permission which enabled the firm to continue to carry out consumer credit related activities for which the firm was previously licensed after 1 April until its application for authorisation had been approved, refused or withdrawn.

64. The letter also stated that the Authority would set application periods for firms to apply for authorisation and that the Authority would by 1 May 2014 write to let Dr Köksal know when his application period would be. That letter was duly sent on 23 April 2014, notifying Dr Köksal that the application period for his firm was between 1 November 2014 and 31 January 2015. The letter also stated that if no application was made during this period then the firm's interim permission would lapse but otherwise the interim permission would last until the decision was made on the application for

authorisation. The letter also made it clear that during the interim permission period, the firm would continue to be subject to the Authority's rules and regulatory oversight.

65. By way of background, the Authority made directions setting out application periods for different categories of firm based on various factors including the level of risk they pose; debt-adjusting and debt-counselling are regarded by the Authority as higher risk activities and so were in the earlier application periods. In doing so, the Authority took account of the OFT's findings in September 2010 that in the markets covered by these activities poor practices appeared to be widespread, including the provision of poor advice based on inadequate information.

66. On 27 November 2014 Dr Köksal applied to vary his Part 4A permission so as to include the consumer credit activities described at [1] above.

The Variation Application and events up to its determination

67. A considerable number of the findings under this heading were also made by the Tribunal in the Suspension Decision, but for convenience they are repeated here where they have been in effect adopted as findings of this Tribunal.

68. As mentioned at [66] above, on 27 November 2014, Dr Köksal made the Variation Application. The application form required by the Authority for an application of this type does not call for detailed information. It was rightly described by Dr Köksal as a "tick box" application, although as with any application the Authority has the right to ask for further information when considering it and the form clearly states that the applicant may be asked to provide documentary evidence in support of its answers, either during the application process or at a later point.

69. Dr Köksal is critical of the fact that it was not made clear, either in the letters sent to him by the Authority in March and May 2014 or in the application form itself, that what he was being asked to do was to apply for a Part 4A permission. We agree that term is not specifically used, other than a reference in the form to the fact that in order "to be given and retain" a Part 4A permission a firm must continue to satisfy the Threshold Conditions. This wording is therefore not specific to applications to vary existing permissions and we think it would be more helpful if the form itself stated clearly at the top that it was an application for the variation of an existing Part 4A permission.

70. However, we do not give the significance to this point that Dr Köksal seeks to do; we think that on balance the material that he received made the essentials of the process clear to him, namely that in order to continue to carry on consumer credit activities he needed to make an application to that effect and satisfy the Authority that he would continue to meet the Threshold Conditions both in relation to his existing activities and the new activities that he had applied for. The form then makes it clear that what the applicant is doing is making a request to add new activities to his existing permission, notwithstanding the fact that he carried on those activities for a long period of time, pursuant to his original consumer credit licence and the interim

permission granted by the Authority. Despite that, the legal position is that these become new activities to be regulated by the Authority under the terms of the firm's existing Part 4A permission, as varied should the application be granted.

71. As regards the detail concerning the firm's activities relating to consumer credit that the form asked for, this was captured by a drop-down "tick box" menu thus giving rise to standard answers.

72. Therefore, in relation to credit broking the description given was "non-regulated commercial loans, commercial mortgages, buy to let property purchases, bridging loans etc.". It is as a result of this answer that much of the later confusion to what business the firm carried on which fell to be regulated by the Authority arose. Dr Köksal formed the clear impression in his mind that his business in relation to commercial loans was unregulated and was critical of the fact that the application form gave the applicant no opportunity to explain in further detail what was being applied for. Nevertheless, as the description of what is covered by the regulated activity of "credit broking" referred to at [35] above shows, credit broking of underlying unregulated credit agreements is itself regulated unless the borrower is a corporate body or a partnership or an unincorporated association consisting entirely of corporate bodies. We accept that this is not an easy distinction for the average lay person to get his mind around because of the opaqueness of the drafting of the statutory and regulatory provisions and, as we find below, we do not believe in this case the Authority has been as helpful as it should have been in explaining the distinctions to Dr Köksal.

73. In relation to debt-adjusting, the permission applied for was limited to debt adjusting with no debt management. In relation to debt administration, the application was limited to dealing with disputes between clients and electricity, gas, communication suppliers, banks and insurance companies. In relation to debt-counselling the application was limited to counselling with no debt management activity. It transpired, through Dr Köksal's evidence at the hearing of his reference, that the application for debt administration was unnecessary. That regulated activity only relates to debt administration carried out on behalf of a lender, and the services that Dr Köksal described in the Variation Application were all provided by him to borrowers. Those activities would therefore have fallen either under the regulated activity of debt-adjusting or debt-counselling and not debt administration.

74. At the end of the form, Dr Köksal ticked a box to indicate confirmation that the firm had a suitable business plan available that reflected the firm's current business and proposed changes. There was no requirement to file the business plan itself. Two further relevant boxes were ticked. First, Dr Köksal confirmed that he had in place a compliance manual and a compliance monitoring programme that reflected the firm's current business and the proposed change in business. Secondly, he confirmed that the firm was ready, willing and organised to comply with the relevant provisions in the Authority's Handbook relating to conduct of business. Somewhat surprisingly, he was not asked to give that confirmation in relation to CONC.

75. On 9 December 2014 the Authority gave Dr Köksal a decision notice informing him that the Authority had decided to refuse the firm's application to vary its permission to include mortgage intermediary activities. The reasons given for the refusal can be summarised as follows:

(1) Dr Köksal, who would be the firm's only mortgage adviser, had failed to demonstrate that he holds any of the appropriate qualifications required for the firm to carry on regulated mortgage contracts activities;

(2) Dr Köksal had failed to demonstrate that the firm had appropriate arrangements in place to oversee its mortgage advice and therefore the Authority was not satisfied that the firm had adequate systems and controls in place to identify and measure any risks of regulatory concern that it may encounter in conducting its business; and

(3) Dr Köksal had failed to demonstrate that the firm had an appropriate locum arrangement in place and therefore the Authority considered that there was a risk to the continuity of the services to be provided by the firm to customers;

The Authority then concluded that the firm was not a fit and proper person to carry on regulated mortgage contracts activities having regard to all the circumstances regarding Threshold Condition 2E, in particular:

(1) Dr Köksal's responses to the Authority's request for information to assist its determination of the application do not demonstrate that he accepts or understands the regulatory requirements that the firm would have to meet to carry on regulated mortgage contracts activities, or that he understands why it is important that the firm comply with such regulatory requirements. The Authority was therefore not satisfied that the firm had a competent and prudent management and that it would carry on the regulated mortgage contracts activities with due skill, care and diligence;

(2) Dr Köksal had not provided evidence that the firm had addressed supervisory concerns raised by the Authority in February 2011 and February 2012 in relation to its mortgage business. The Authority was therefore not satisfied that the firm was ready, willing and organised to comply with regulatory requirements and standards; and

(3) Dr Köksal had failed to provide the Authority, either in a timely manner or at all, with information requested by the Authority to assist its determination of the application. The Authority was therefore not satisfied that the firm would be open and cooperative in all its dealings with the Authority.

76. Dr Köksal has been very critical of the manner in which the application in respect of mortgage activities was handled by the Authority and on 27 February 2015 made a complaint to the Authority in that regard. We do not regard the subject matter of the complaint as being a matter for the Tribunal and we have therefore not considered it further.

77. Initially, Dr Köksal decided not to refer the decision notice in relation to the mortgage activities application to the Tribunal. He subsequently changed his mind, and made an out of time reference on 8 June 2015 which, in a decision released on 17 November 2015 (citation [2015] UKUT 0603 (TCC)) the Tribunal refused to admit on the grounds that it concluded, in all the circumstances, that it was in the interests of justice that the time for the making of the reference was not extended. Accordingly, a final notice was issued in relation to this application on 15 January 2015.

78. On 7 January 2015 the Authority sought further information on the Variation Application. We should say something about the effect of that request. Dr Köksal has at all times maintained that the Variation Application was complete as submitted. However, in regulatory terms, the application is to be regarded as incomplete if, after its submission, the Authority asked for further information and that information is not provided.

79. The request made on 7 January 2015 asked for "an explanation as to how each of the permissions you have applied for will be used in the day-to-day running of the business". This request was therefore not very explicit as to the level of detail expected in the answer. In particular, it did not ask about the kind of customer to whom Dr Köksal provided his services. It is perhaps surprising, bearing in mind that Dr Köksal had had to confirm on the application form that he had a business plan covering the activities for which permission was sought, that the Authority did not simply ask for a copy of the business plan which might contain the information that the Authority was seeking in a format that it would expect.

80. The request also sought an explanation as to how Dr Köksal had addressed the concerns outlined by the Authority following the supervision visit made in 2012. It is perhaps surprising that the Authority did not specifically explain why that information was relevant to the Variation Application, which related to a different line of business. It is apparent that Dr Köksal could not see the relevance of the request and it might have assisted his understanding had the Authority explained that there was a clear read across, as we accept is the case, of failings identified in relation to one part of the business to another part. In particular, in our view, the failings identified in the supervisory visit in 2012 and the reasons given by the Authority in the decision notice relating to the mortgage activities as to why the application had been refused would have prompted a reasonable firm, which was in the course of making another application to the Authority, to take those matters into account and address them when responding to the Authority on requests for further information about its business. Therefore, although the Authority might have been more explicit on these matters, in our view, Dr Köksal did not appreciate the significance of these requests as he should have done.

81. Mr Baker explained in his evidence why the information sought about how the consumer credit permissions applied for would be used (which we refer to as the "Permissions Information"). He also explained how the concerns expressed following the supervision visit in 2012 had been addressed (which we refer to as the "Supervisory Information") were highly pertinent to the Authority's assessment of the Variation Application.

82. Mr Baker's evidence, which we accept, was that this information would further the Authority's understanding of the firm's business and whether the Threshold Conditions were met.

83. In particular, with respect to the Permissions Information, the Authority would have gained clarity as to the purpose behind the Variation Application and the intended use of the permissions sought. The information would allow the Authority to understand the different types of clients and the level and nature of business entered into. It would have assisted the Authority in assessing the business activities the firm will be undertaking; why those business activities required the firm to apply for certain permissions (in order to ensure that the firm had applied for the correct permissions for the activities it intended to undertake), and how it would then use those permissions in undertaking its business activities.

84. With respect to the Supervisory Information, Mr Baker said that information would have enabled the Authority to determine whether the firm continued to pose a risk to consumers due to the failures in the firm's systems and controls to prevent the risk of financial crime in its mortgage intermediary activities that the Authority had identified during its supervision visit in 2012. Mr Baker explained that the Authority therefore sought the Supervisory Information as the Authority considers that these concerns have the potential to apply in relation to a consumer credit business. As we have said, we think it would have been better had this been spelled out in the initial request for information, but, as we conclude later we have not found this to be a material issue in relation to our decision.

85. Mr Baker's evidence was that the Authority asks a broad or "open" question along the lines of the email sent to Dr Köksal on 7 January 2015 which in most cases elicits a helpful response on the back of which the Authority can, as appropriate, then probe further with more targeted questions. Mr Baker said that he would usually expect a response to such a question broadly to cover the business activities the firm will be undertaking, why those business activities required the firm to apply for certain permissions (in order to ensure that they had applied for the correct permissions and limitations for the activities it intended to undertake) and how the firm would then use those permissions in undertaking its business activities. Mr Baker would expect an applicant receiving this question to respond to the question expressly; he said it would be a matter for them whether they drew material from their business plan and/or provided a copy of the business plan at the same time.

86. As we have said, we think that it would have been better had the Authority asked for a copy of the business plan in the initial request as it seems to us that further targeted questions could have followed from the information contained in that. Having said that, the copy of the business plan dated 22 June 2014 that was in the evidence bundle contained none of the relevant information that the Authority was seeking to determine how the permissions in question would be used

87. Dr Köksal's reply was, like the Authority's initial request, short on detail. He wrote on 15 January 2015 that although credit broking comprises a wide range of credit activities, he had never arranged or dealt with any secured or unsecured

personal loans or hire purchase. He stated that he had only been working as a "business finance broker" and intended to continue to do so. In relation to the other activities for which permission was sought, he only addressed debt adjusting and debt counselling and stated that he had only been involved in commercial loan disputes with banks and business clients' disputes with energy companies. He stated that he had never dealt with "consumer credit". It is clear from this answer that at this stage Dr Köksal did not (wrongly as he now accepts) believe that dealing with businesses could amount to carrying on consumer credit related activities which fell within the scope of the Authority's regulation.

88. Mr Baker is critical of the level of detail contained in Dr Köksal's response but to be fair to Dr Köksal the Authority's question was equally non-specific and could have indicated more clearly the type of information that was being requested. We would therefore not be too critical of Dr Köksal's initial answer, bearing in mind the way the question to which he was asked to respond was phrased.

89. Dr Köksal had finished his response by asking the Authority to amend his application if it considered that necessary so as to reflect whatever permissions he required.

90. The Authority responded by email on 19 January 2015, stating that it could not amend the application but could only assess the application that had been made and the permissions that Dr Köksal would like to add or remove. The email quoted extracts from the Authority's Handbook setting out summaries of the definitions of the regulated activities in question. In particular, the summaries appear to be drafted taking into account the scope of CONC and the definition of "customer" used in its provisions because, at least in relation to credit broking, it describes the activities as being covered where the services concerned are provided to an individual. This may be said to be confusing without an explanation that in fact the definition of "individual" also includes certain partnerships and unincorporated bodies.

91. The Authority asked Dr Köksal to review these definitions and to revert confirming whether the activities he wished to carry on were covered by the permissions and if so to provide "some detail regarding the exact activities you will be doing with the permissions in question." Again, there was no indication as to the level of detail that was required to answer this question. In particular, the Authority's response did not specifically indicate that services to businesses could be covered, although Dr Köksal in his response indicated that he only provided services to businesses and it could be taken from his reply that he believed (wrongly) that in those circumstances his activities would not be subject to detailed regulation.

92. Dr Köksal continued in his misapprehension in his reply on 26 January 2015, reiterating again that he did not deal with "personal loans". He emphasised that the firm's introductions to lenders related to "business loans" and the disputes he acted in relation to involved "commercial loans". He said that he had introduced "SMEs, self-employed individuals to banks and financial institutions as business loan applicants; and dealt with business loans for freehold and leasehold purchases and for business

development purposes for start-up businesses for loan amounts over £10,000". He concluded his response by saying:

> "Therefore, it is obvious that our business dealings do not include any regulated business activities, but, to my comprehension, those activities above may fit into those umbrella categorisations you have stated in your email. However, if the FCA has different understanding and interpretation for our business activities described above, please urgently advice [sic]"

93. It is clear from this answer that Dr Köksal had still not appreciated that business loans to individuals would be caught by the Authority's regulatory provisions. As the Tribunal said, when considering this point in the Suspension Decision, although it is not for the Authority to give advice to individual firms as to whether they required a permission to carry on their activities or not, there is no reason why it should not explain why it thinks a response indicates that a firm has got the wrong end of the stick on a point. That was clearly the case in this instance.

94. The Authority did this to a degree in its next response on 29 January 2015. It is clear that the Authority now understood that among other things Dr Köksal dealt with commercial loan disputes so it asked him to "confirm what type of clientele you do this work on behalf of (for example individual consumers or businesses)?" As the Tribunal found in the Suspension Decision, the distinction between individual consumers and businesses was not the relevant issue because Dr Koksal had said that he only dealt with businesses in his previous responses. The key point was whether those businesses were individuals or not. The Authority went on to say, in response to Dr Köksal's statement in his last reply that his business activities did not include regulated activities that it was "somewhat confused by this as the activities you have applied for are indeed regulated, which is the purpose of this application. I would therefore appreciate your clarification in respect of this comment." It was therefore clear that the parties were at cross purposes. The Authority concluded by saying that it was unable to provide advice in respect of the application and recommended that if advice was required Dr Köksal should seek independent legal advice.

95. Notwithstanding the criticisms that can be made as to the manner in which some of the Authority's answers were expressed, as the Tribunal found in the Suspension Decision, it would have been prudent if at that stage Dr Köksal had taken advice and clarified the position. What he did do was to reply to the Authority on 2 February 2015 by stating that his customer base was self-employed individuals who were business owners and also companies. In response to the request for clarification as to whether the activities were regulated or not, Dr Köksal simply said that he been doing the same business for the last 26 years and merely quoted the terms of his existing licences from the OFT. Dr Köksal stated that he was not dealing with any regulated credit activities except for non-investment and general insurance. It was clear that he still did not understand the nature of the application process. In particular, he did not understand that in the light of the transfer of consumer credit regulation from the OFT to the Authority, what he was applying for was a variation of his existing permission from the Authority so as to include the necessary consumer credit activities because

he said he believed he needed a consumer credit licence and the application form had taken him to a "full Licence Application section".

96. On 26 February 2015, as well as seeking further clarification on Dr Köksal's business activities, the Authority asked for detail concerning the roles of staff members and their experience. The Authority also asked for an explanation as to how Dr Köksal had addressed the concerns expressed by the Authority arising out of the supervision visit which took place in early 2012 and the findings made in the Decision Notice given on 9 December 2014 in relation to the mortgage activities application. As we have mentioned above, these are clearly matters which are relevant to the consideration of the Variation Application. The Authority asked again for "a detailed explanation regarding (i) the activities the business is involved in at the moment, and (ii) the activities that will be carried out using the permissions you have applied for as part of this application...For assistance with this, please refer back to my email of 19 January 2015, which contain the definitions for the activities applied for." The Authority also asked for confirmation as to which lenders Dr Köksal would refer customers.

97. As the Tribunal found in the Suspension Decision, it is at this point that the tone of the correspondence changed and it is fair to describe Dr Köksal's attitude towards the Authority from now on as being confrontational. We agree with Mr Baker that from this point Dr Köksal's tone was not what would be expected from a firm being open and cooperative with its regulator. In what appears to be frustration, Dr Köksal repeated in his response of 26 February 2015 what he had previously said about the nature of his credit related activities. With regard to the questions about his staff, Dr Köksal said he could not understand why this question was being asked but he described briefly what those members of staff were dealing with and said that they all had more than 12 years' experience in their field. As regards the question regarding the supervision visit in 2012, Dr Köksal appeared to dispute that anything further was required as a result of the visit or that those matters were relevant to the Variation Application. However, Dr Köksal failed to understand that a system of compliance checking of files and advice would uncover other errors and that such reviews should be regularly performed on an ongoing basis. The Authority requires information about the systems of compliance checking along with the results of such checking to gain assurance that the regulated firm is 'fit and proper'.

98. The correspondence continued in the same vein over the next few months. It is fair to say that no more significant information emerged and a stalemate was created. Dr Köksal maintained the position that he had provided all the information that had been requested. In its email of 23 April 2015, the Authority pointed out that it did not issue Consumer Credit Licences and that the application that had been made was for a Part 4A Variation of Permission, to add consumer credit permissions to the firm's existing permissions and that were that application to be approved, it would be under the existing firm reference number. Dr Köksal maintained during the hearing of his reference that this was the first time he had appreciated that, although, as we have mentioned, we think that should have been apparent to him earlier.

99. In its email of 23 April 2015, the Authority suggested that Dr Köksal may wish to seek the advice of a compliance consultancy firm, repeating that the Authority could not provide advice regarding the permissions required for the firm's business. In view of the stalemate that had been created by the correspondence, we believe that would have been an appropriate course for Dr Köksal to have taken at that point.

100. On 18 June 2015 Dr Köksal submitted a complaint in relation to the manner in which the Variation Application was being handled by the Authority. As we have previously indicated, in our view this is not a matter that we need to be concerned with in making our decision on Dr Köksal's reference.

101. On 15 July 2015 the Authority wrote to Dr Köksal informing him that unless the information that had been requested was provided by 29 July 2015 the application would be determined as it currently stood and the Authority would recommend that Dr Köksal be issued with a Warning Notice setting out the basis on which the Authority proposed to refuse the application.

102. After further inconclusive correspondence, a Warning Notice was issued on 23 September 2015. Dr Köksal made written representations on the Warning Notice to the Authority's Regulatory Decisions Committee ("RDC"). As the Tribunal found in the Suspension Decision, the tone of Dr Köksal's representations was somewhat intemperate. In particular, he questioned why what he regarded as inexperienced officers of the Authority had sought to tell him what to do, when he was a person with 36 years practical, academic and professional experience in dealing with SMEs. The representations indicated that Dr Köksal still had not understood why some of the credit related activities he carried on would be subject to regulation, even though he dealt only with businesses. No further detailed information was provided to the RDC as to the profile of the ancillary credit businesses that Dr Köksal was involved in.

103. Having considered Dr Köksal's representations, the RDC gave Dr Köksal a Decision Notice which stated that the RDC had decided that the Variation Application be refused. The Decision Notice was given because the Authority was not satisfied that Dr Köksal will satisfy, and will continue to satisfy, in relation to the additional regulated activities for which permission is sought, the Threshold Conditions for the following principal reasons which can be summarised as follows:

> (1) The Authority requested an explanation as to how the permissions applied for would be used in the day-to-day running of Dr Köksal's business but received only a brief outline in response and, in further correspondence, the Authority repeatedly asked Dr Köksal to provide more detailed information and clarification in respect of these matters which has not been provided. Dr Köksal's answers largely repeated the brief information given in his initial response;
>
> (2) Dr Köksal's answers to its request for details relating to the roles and relevant experience of his staff were an inadequate answer to the detailed question posed;

(3) Dr Köksal did not provide any substantive answer to the Authority's request for information in relation to how the concerns arising from the Authority's 2012 supervisory visit had been addressed and indicated, in general terms, that he did not accept the validity of the concerns or that they were relevant to the current application. Although this request was repeated several times in subsequent correspondence, Dr Köksal had not given any substantive response in relation to how he has addressed the issues identified in that supervisory visit; and

(4) Between 7 January and 15 July 2015, the Authority had sent a total of nine letters or emails requesting from Dr Köksal information summarised above and, although Dr Köksal has engaged in extensive communication with the Authority, his application remains incomplete because he has failed to provide all of the required information.

104. The RDC also made it clear, at paragraph 10 (d) of the Decision Notice, that the matters raised following the supervisory visit carried out in 2012 were pertinent to the Variation Application because of the potential for similar failings in a consumer credit intermediary business.

105. On 16 January 2016 Dr Köksal referred the Decision Notice to the Tribunal.

Events since the Decision Notice

106. As mentioned above, in making his reference to the Tribunal in respect of the Variation Application, Dr Köksal also applied for a direction that the effect of the Decision Notice in relation to that application, namely that he must cease carrying on the consumer credit activities for which he had an interim permission, be suspended pending the determination of his reference.

107. In the Suspension Decision, which refused Dr Köksal's application for a suspension, the Tribunal observed that the evidence that he filed in relation to that application indicated a change of approach to the combative and confrontational style manifested in Dr Köksal's previous correspondence with the Authority and other documents relating to these proceedings. The Tribunal observed that it is likely that this change of style has been influenced by the fact that he instructed lawyers to represent him the day before the hearing of the suspension application.

108. In particular, the Tribunal made the following findings at [61] and [62] of the Suspension Decision:

> "61. As indicated above, Dr Köksal has now changed his tone somewhat. He has given more detail about the staff who work for him. He now accepts that he should have given more information to the Authority in response to its requests, whether or not he regarded them as acting unreasonably in asking for it. He accepts that he must be cooperative with the Authority because of their duties to regulate the sector and admits that he has been "excessively defensive and closed" which he should not be. He does say, however, that the

> Authority should be "a little bit more transparent and understandable".
>
> 62. One of Dr Köksal's members of staff is now taking a CeMap course, and the firm has now engaged the services of a leading compliance consultancy firm, SimplyBiz, to give ongoing compliance support in relation to the firm's consumer credit activities. It was clarified that SimplyBiz had not been engaged to undertake a full review of these activities, but was merely engaged to provide support through its consumer credit technical team to answer queries as and when requested."

109. The evidence of the two customers of Dr Köksal referred to at [41] above was also available for the hearing of the suspension application and some limited further information about the nature of Dr Köksal's credit related activities was to be found in the witness statements of those two customers.

110. Mr Polat in his witness statement confirmed that he is self-employed and has known Dr Köksal for 20 years. He first used Dr Köksal's services in order to seek financial advice on the purchase of a property 20 years ago and has since used his services in connection with financial advice on the purchase of residential properties and commercial property. He is complimentary about Dr Köksal and the way he has been dealt with by him.

111. Mr Gurgur gives similar evidence. He is self-employed running his own grocery business. He says he was first introduced to Dr Köksal in order to seek financial advice on the purchase of a commercial property and has since used his services for advice on many matters including residential mortgages, commercial mortgages and personal loans. He is also complimentary about Dr Köksal and the way he has been dealt with by him.

112. As we mentioned above, because neither of these witnesses were made available for cross-examination we have not placed much weight on this evidence.

113. The Tribunal gave some very clear pointers to Dr Köksal at [73] and [74] of the Suspension Decision as to what information might be of assistance to him in presenting his case on the substantive reference and which therefore might enable the Tribunal to make an assessment as to whether, in the light of such further information, the Variation Application could be remitted to the Authority for further consideration. The Tribunal said the following:

> "73. With respect to the information concerning the credit related activities which were requested by the Authority in the course of considering the Variation Application, as I have indicated above, there have been faults on both sides in the way in which this has been handled. Nevertheless, the fact remains that there is still no clear evidence as to the nature and scale of the credit related activities. We still do not know how many customers the services are provided to, what the level of income derived from those services are, what is the precise nature of the services provided and how the customers break down into the various categories, such as company, individual or

> partnership. There is no information as to the likely scale of those activities in the period up to the determination of the reference, which is the relevant period in considering the Suspension Application. As I have already indicated, all of these issues are highly relevant in assessing the risks posed to consumers by the manner in which the business is carried on and they are clearly relevant to the assessment as to whether Dr Köksal can satisfy the Threshold Conditions.
>
> 74. There is nothing available from which a judgment can be made as to the extent to which the business carried on falls to be regulated by CONC and what the impact of CONC will be on those activities which do fall within its scope. That can only be ascertained by a full description of the nature of the service provided in particular cases, for example whether advice is given, the amount of the loan and the experience of the customer. Until that information is provided there must be serious concerns about whether Dr Köksal is able to meet the Threshold Conditions in relation to the credit related activities."

114. When asked by the Tribunal at the hearing of his reference as to what steps he had taken in response to the observations in those paragraphs of the Suspension Decision, Dr Köksal said that he had not read them. He said he did not read the Suspension Decision in any detail because his application had been refused.

Further findings regarding Dr Köksal's consumer credit activities

115. During the course of the hearing, we were taken to a number of documents which give some indication of the nature of the consumer credit activities carried on by Dr Köksal and the procedures he followed in relation to that business. Also, on the second day of the hearing, Dr Köksal finally provided some information as to the breakdown of his business as described at [119] below.

116. First, we saw various standard questionnaires and fact-finding forms designed to obtain the necessary information so as to advise a customer, depending on the services sought. We saw separate fact finding forms for buy to let and commercial mortgage activities and the questionnaire used for business clients, which in particular, asked the client as to its legal status, that is whether it was a limited company, a partnership or a sole trader. It appears to us that these forms were sufficiently comprehensive and would have given Dr Köksal the information he needed to answer the Authority's questions about the type of customers with whom he dealt and the scale of his activities with those customers. All he would have had to have done was to have collated the information gathered from these forms. It is of course good practice to do this by creating a new business register which gathers all the relevant information together in a convenient place.

117. Dr Köksal was asked whether he had a system in place that would enable him to ascertain whether the services he provided to the customer were regulated consumer credit activities. His answer was that the necessary information would be included under the space left blank at the end of the form headed "advice and recommendations." We agree with Mr Fell that would have been an unusual place to see such information and we saw no completed forms that would indicate that such

information was routinely captured here. In the light of our findings as to Dr Köksal's understanding as to what consumer credit business was in fact regulated we find that Dr Köksal was mistaken in his belief that the relevant information would have been included on the fact-finding forms.

118. Secondly, we saw three examples of contractual documentation with customers, all of which related to business loans taken out by two of Dr Köksal's customers, one of which was Mr Gurgur. In relation to the other customer, the evidence shows Dr Köksal, to that customer's benefit, brokering a loan with a bank on better terms than the customer had with his original lender. The loan agreement between Mr Gurgur and a bank is expressed to be a refinancing of existing indebtedness with another bank, and we accept Dr Köksal's evidence that this was also an instance of his brokerage services resulting in a loan for his customer which was on better terms than he previously had. However, the documentation shows clear evidence of Dr Köksal carrying on regulated consumer credit activities as the borrowers in these instances were individuals.

119. Thirdly, on the second morning of the hearing, as a reaction to the questioning from the Tribunal the day before as to whether he had provided any of the Permissions Information referred to at [73] and [74] of the Suspension Decision, Dr Köksal produced a schedule headed "output statistics between 2006 and 2016" which showed a breakdown in percentage terms of the fees charged by the firm in respect of the various categories of business carried on, namely consultancy fees, life policy commissions, general insurance commissions, mortgage and remortgage commissions and commercial mortgages and loans commissions.

120. As Dr Köksal pointed out in unsolicited correspondence sent to the Tribunal after the hearing, Dr Köksal had in fact on 29 July 2015 in the course of his correspondence with the Authority on the Permissions Information, previously disclosed the percentage of his total fees derived from commercial loans and commercial mortgages.

121. The information provided by Dr Köksal in the schedule referred to at [119] above, shows that a substantial amount of the fees earned by the business is derived from what were described as commercial mortgages and loans. For example, in 2014 62% of the firm's fees were derived from such activity, the figures being 45% in 2015 and 52% in 2016. What is not known, however, is how much of that business is regulated business, because the statistics provided do not show whether the customers concerned were limited companies (in which case the activities would be unregulated) or were partnerships of individuals and individuals (in which case the activities would be regulated). It therefore appears that Dr Köksal still does not appreciate the importance of that distinction. In any event, the information belatedly provided does not cover all the matters referred to at [73] and [74] of the Suspension Decision. For example, it gives no detail as to the turnover of the business or the number of customers dealt with in each category.

122. Finally, we saw a document produced by Dr Köksal from a format provided by the compliance consultant, SimplyBiz. The document is dated 15 May 2016 and is entitled "Regulatory Business Plan".

123. However, despite its title, there is little in the Plan dealing with how Dr Köksal will approach his regulatory responsibilities and the systems and controls in place in that regard.

124. In the document, reference is made to the application process for the consumer credit related activities. Dr Köksal, by reference to the Authority's February 2014 policy statement for consumer credit, accepts that the activities carried on are in the "high risk activities" category but goes on to say this under the heading "experience, competence and risk to "Consumer":

> "If they are now considered in a high-risk category, since we have been dealing with those business activities and services for the last 27 years, and, since we have so far provided excellent service to our clients (to consumer) without any difficulty, without any problems or risk to anyone, we cannot see any reason why we could not continue to provide the same services efficiently and effectively without any risk to our Client or consumer at large. So, there could not be any risk element unknown to us to be able to overcome or eliminate with our many years' experience in this sector."

125. In relation to financial crime and anti-money laundering issues, the document simply states:

> "We are also very careful for financial crime and anti-money laundering issues. Therefore, we use our interrogation and interview techniques to filter out those kinds of people."

126. Under the heading "client profile" the document has a very general description of the firm's customer base, without any of the detail that the Authority has previously been seeking.

127. The document contains some description of the various consumer credit related activities that the firm carries on. In relation to credit broking, the document describes that the firm makes a thorough search from the whole of the market so as to provide a comparison of loans and lenders' details to its clients. The document states that cash flow forecasts are prepared together with a sensitivity analysis which has been a key indicator to assess affordability and to enable lenders to assess the serviceability of the loan. The document then goes on to say this about suitability:

> "Therefore, our fact find forms and business plans have protected the clients' interests as well as indicating the client's affordability to the lenders. We have always warned our clients if the products are not suitable for them. Since we are independent adviser, and worked with whole of the market, we have given them every opportunity to shop around. We have chosen the best possible product/s for our clients, and consequently we have given the best advice for their needs."

128. The document says nothing about recordkeeping in relation to the advice given and in particular, how a record is kept of the reasons why that advice is given.

129. In relation to the other consumer credit activities, there is a brief description which says no more than the information previously provided to the Authority.

130. Under the heading "Treating Customers Fairly" the document says:

> "… TCF has always been a natural component part in the firm's thinking, and in our diligent customer services. However, prior to authorisation the firm will consult with their compliance service provider, in order to implement a robust and more bespoke TCF programme."

131. There are very brief descriptions of other arrangements regarding reporting, capital requirements and disaster recovery and the document concludes with a statement that the firm will not require any external locum arrangements.

132. It is clear from this document that Dr Köksal has recently been seeking advice from compliance consultants, but although they appear to have provided the template for the Regulatory Business Plan, it is not apparent that they have had much input into its actual content. Dr Köksal said in his closing statement that he intends to work with various compliance consultants going forward, but it appears that so far he has relied on them for ad hoc advice rather than detailed bespoke advice on the systems and controls and processes that the firm should put in place with a view to demonstrating to the Authority that it meets the Authority's regulatory requirements.

Findings regarding the Authority's approach to supervision

133. In his evidence, Mr Baker explains the nature of the supervision that the Authority would carry out in relation to a small firm similar to Dr Köksal's firm. Firms of this nature are not individually, proactively supervised. Generally, when the Authority becomes aware of significant risk to consumers or to markets arising out of the activities of such a firm it will react but the firm would not be allocated a named individual supervisor and would not be subject to the same level of proactive, firm-specific supervisory attention afforded to larger firms. Therefore, as Mr Baker explained, the Authority would rely heavily on the information that the firm itself provides, both in response to information requests and by way of self-reporting where required. The Authority's supervisory model requires these firms to be cooperative with the Authority in order for it to effectively assess and mitigate risks that those firms might present to consumers. A failure to provide information by such a firm would, Mr Baker says, prevent the Authority from building a proper understanding of the nature and extent of any risk to consumers, and can prevent the Authority from understanding the full extent of the firm's possible failings.

Discussion

134. The essence of the Authority's case against Dr Köksal is that the Authority is neither satisfied that his firm is capable of being effectively supervised having regard to all the circumstances, including the nature of the activities it carries on and in the

way the business is organised, nor that the firm has been managed in such a way as to ensure that its affairs will be conducted in a sound and prudent manner. On that basis, the Authority contends that it cannot ensure that Threshold Conditions 2C and 2E will be satisfied.

135. In that regard, the Authority relies on the failure of Dr Köksal to provide in substance either the Permissions Information or the Supervisory Information.

136. Mr Baker's view is that the failure of Dr Köksal to provide either the Permissions Information or the Supervisory Information over a 16 month period has constrained the Authority's understanding of the firm's business. This includes whether the firm has applied for the correct permissions, would be able to undertake its proposed business activities compliantly and in a way which does not pose a risk to consumers (for example due to risks around the controls to prevent financial crime).

137. Mr Baker has real concerns that Dr Köksal would not engage with the Authority in an open and cooperative manner in relation to his consumer credit business if authorised for two principal reasons. First, in Mr Baker's view, Dr Köksal appears unclear as to the extent of the Authority's regulatory perimeter in relation to consumer credit business. Secondly, if an applicant for regulatory approval is proving non-cooperative at the authorisation stage then that is a cause for real concern and is likely to lead to a recommendation that the application be refused. This is because the Authority's supervisory approach to small firms, as discussed at [133] above, requires firms to be cooperative with the Authority and proactively to identify and report matters of which the Authority would expect notice in order for it effectively to assess and mitigate risks that such firms might present to consumers.

138. Therefore, in our view we have two questions to answer in order to determine this reference. The first is whether failure to provide the Permissions Information or the Supervisory Information and the approach taken by Dr Köksal in responding to the Authority's requests for that information are sufficiently serious that the decision to refuse the Variation Application on the basis of that failure is a decision within the range of reasonable decisions open to the Authority. The second question is whether in fact the information requested by the Authority has in substance been provided. Were we to find that that was the case, and assuming we were with the Authority on the first question, then the Authority's decision would have proceeded on the basis of a wrong view of the facts and it should properly be remitted for further consideration. Were we to find that the information has not in substance been provided then, again assuming we are with the Authority on the first question, we should dismiss the reference.

139. Following on from our finding at [37] above as to where the burden of proof lies, if we determine the first question in favour of the Authority, then the evidential burden is on Dr Köksal to demonstrate that the information concerned has in fact been provided to the Authority.

140. We have no doubt that the Authority was fully entitled to ask for the Permissions Information and the Supervisory Information. Furthermore, in our view, the

information concerned was necessary for the Authority to make an informed decision about whether the firm met the Threshold Conditions as far as the activities which were the subject of the Variation Application were concerned.

141. In particular, the Authority needs to know the scale of the business to be undertaken and how much of it falls to be regulated. In that regard, it was necessary for the Authority to understand how the firm's customers break down into individuals, partnerships and companies and the likely scale of the different activities for which permission is sought. We accept Mr Fell's submission that, without this information, the Authority cannot determine the parts of the firm's business which will fall within the scope of the consumer credit regulated activities for which permission is sought or how CONC may apply to them. With that information, the Authority will be able to make an informed assessment as to the risks to consumers posed by the carrying on of those activities by the firm.

142. As regards the Supervisory Information, clearly in the light of the concerns expressed in 2012 and the subsequent refusal of Dr Köksal's application to reinstate the firm's permissions for mortgage intermediary activities, the Authority was entitled to know whether the firm had made any changes to its systems and controls and processes for taking on new business in the light of the concerns previously raised. We accept that appropriate procedures to prevent the firm's business being used for financial crime are just as relevant to consumer credit activities as they are to mortgage related activities. Whilst the correspondence with Dr Köksal might have been more explicit on this point, we have no doubt that he should have appreciated the point himself.

143. Turning to the second question, there can be no doubt that, as at the date of the Decision Notice, neither the Permission Information nor the Supervisory Information had been provided to any material extent.

144. Dr Köksal was asked repeatedly during cross-examination and by questions from the Tribunal as to what he had provided to the Authority in response to their requests.

145. As far as the Supervisory Information is concerned, the reason no such information was provided was because there was none to provide and Dr Köksal did not believe it to be relevant. When asked about it in cross-examination, he said he did not see the reason to provide details of any follow-up from the supervision visit because he had ceased to provide services in relation to regulated mortgage contracts. He therefore clearly had given no thought to the issue in the context of his application to reinstate the mortgage permissions and when he came to make the Variation Application.

146. It is, therefore, clear that Dr Köksal is unable to demonstrate that there are in fact any internal or external compliance supervision systems in place to ensure compliance with regulatory rules. When asked about his procedures, his only answer is to say that he and his staff have extensive experience. He is unable to give any details of any reviews performed on the firm's customer files or supervisory reviews and compliance training for his staff. Whilst he has mentioned his use of external

compliance advisers, it is apparent from the evidence they have been used only sparingly to provide ad hoc advice when required rather to give any detailed advice as to systems and controls. The Regulatory Business Plan referred to at [122] to [130] above gives no significant detail as to these matters. It is, therefore, clear to us that Dr Köksal has not understood the nature of the step change brought about through the transfer of responsibility for regulation of consumer credit from the OFT to the Authority, as described at [59] above.

147. As far as the Permissions Information is concerned, this was not provided because Dr Köksal simply did not understand the relevance of the Authority's questions. This was because he had not appreciated that a large part of his consumer credit business did in fact fall to be regulated by the Authority. In his cross-examination, he repeatedly said that he could not provide what was being asked for because he had no way of understanding what was in the mind of the Authority's officers when this information was requested without clarification from the Authority as to what business activities were regulated. He said that he had provided answers according to how he felt his business operated.

148. As we have mentioned above, the Authority may be criticised to a degree in not being more explicit to Dr Köksal as to how consumer credit services provided to businesses, such as broking commercial loans, could fall to be regulated. However, we are mindful that the Authority, in taking over responsibility for regulating the sector from the OFT, had "thousands of applications to process". Ultimately, the Authority can only regulate a firm effectively if the firm understands what is required of it. Dr Köksal was clearly unclear as to what business activities fell to be regulated, and in those circumstances he should either have provided as much detailed information as he could about his firm's activities to the Authority or have sought external advice and he did neither.

149. Therefore, as the Tribunal found at [73] and [74] of the Suspension Decision, the Permissions Information had not been provided by the time of the giving of the Decision Notice. The Authority was, therefore, entitled to find that the Variation Application was incomplete. As we have observed at [77] above, the Authority is entitled to regard an application as incomplete if, after its submission, the Authority has asked for further information and that information has not been provided.

150. Furthermore, we agree with Mr Baker that the manner in which Dr Köksal dealt with the Authority in relation to its requests for information means that the Authority could not be satisfied that Dr Köksal would engage with the Authority in an open and cooperative manner in relation to his consumer credit business, for the reasons we summarised at [134] above. The confrontational style that Dr Köksal adopted in relation to his correspondence with the Authority, and his contemptuous dismissal of the abilities of the Authority staff with whom he dealt, are not to be expected from a firm which seeks to be open and cooperative with its regulator. As the Authority's guidance in COND, set out at [16] and [17] above demonstrates, the Authority is entitled to take into account, when considering whether a firm meets the Threshold Conditions, whether the firm is ready, willing and organised to be open and

cooperative with the Authority and whether it has in fact been open and cooperative in all its dealings with the Authority.

151. For these reasons, we have no doubt that on the basis of the information available to the Authority at the time of the Decision Notice, the decision to refuse the Variation Application was one within the range of reasonable decisions that it was open to the Authority to make. The question for us now, in the light of our further findings of fact in relation to matters which have occurred since the Decision Notice, is whether the decision remains one that falls within the range of reasonable decisions open to the Authority or whether our further findings are such that we should remit the matter to the Authority for further consideration.

152. Regrettably, we are not satisfied that there has been any material progress in the firm providing either the Supervision Information or the Permissions Information since the giving of the Decision Notice.

153. At [107] above, we record our finding that there was a change to the combative and confrontational style manifested in Dr Köksal's correspondence with the Authority just before the hearing of the Suspension Application. However, it appears that change of approach was short lived because Dr Köksal demonstrated to us a confrontational style in his answers under cross-examination and he continued to justify his failure to provide the Supervision Information by reference to the lack of competence of the Authority staff who made that visit.

154. It is extremely disappointing that Dr Köksal had not even read those passages in the Suspension Decision which gave him clear guidance as to how he could help himself on this reference and he failed to take that opportunity. The only new information received in response was the schedule that he produced on the second day of the hearing and that was only after he was questioned by the Tribunal as to what steps he had taken in response to the Suspension Decision.

155. Dr Köksal has had some contact with compliance consultants since the Suspension Decision; the Regulatory Business Plan was prepared on the basis of a template provided by a consultant, but it is clear that the content was prepared solely by Dr Köksal himself and it is completely inadequate as a description of the systems and controls that have been put in place with a view to preventing financial crime and for ensuring that customers are given suitable advice. Dr Köksal continues to rely solely on the fact that he considers his previous experience alone should be sufficient for the Authority to allow him to carry on regulated activities

156. He now says that he will work closely with three compliance consultants, to implement a robust "treating customers fairly" programme and to assist him to comply with the necessary regulatory requirements.

157. Dr Köksal said in his closing submissions that the mistakes that he has made in his dealings with the Authority were made under provocation because of the Authority's failure to make it clear to him that his activities in relation to commercial lending fell to be regulated by the Authority. He says the Authority does not respect

his experience and has treated him like an inexperienced independent financial adviser. In his submission, the Tribunal should forget what has happened in the past because of the Authority's behaviour and allow the firm to go forward, supported by the compliance consultants he will engage to assist him.

158. Unfortunately, Dr Köksal's closing submissions indicate that he appears to have learned nothing from his experience of dealing with the Authority and the Tribunal. He cannot simply say now that he wants the slate to be wiped clean and that all will be well going forward. He has not provided the information that has been sought and there is still no indication that he understands what is required or, more fundamentally, the essence of what the Authority is seeking to achieve through its regulatory requirements.

Conclusion

159. Consequently, in our view nothing that has occurred since the Decision Notice casts any doubt on the reasonableness of the decision by the Authority to refuse the Variation Application and there are no grounds for us asking the Authority to reconsider its decision.

Postscript

160. This is a sorry outcome for Dr Köksal but it is of his own making. He cannot now carry on a large part of his business. From what very limited information we saw about the services he provides to his customers, it would appear that he performs a valuable service for his largely Turkish client base and can achieve good outcomes for his customers. It would be a shame if this business cannot be maintained and clearly Dr Köksal needs a succession plan so that others who are able and willing to comply with the Authority's regulatory requirements can take responsibility for the management of the business and make a further application for the necessary permissions to continue the business. It is clear that it will not be possible to satisfy the Threshold Conditions if responsibility for management of the business and compliance issues and systems remains solely with Dr Köksal. He has dismissed, unwisely in our view, the question of a locum but the point has been reached where matters need to go much further than that if the business is to survive.

161. We also hope that the Authority can learn some lessons from what for them has clearly been a difficult experience and which has resulted in it unnecessarily having to devote considerable resource in dealing with what could have been a routine application had Dr Köksal been more cooperative. Nevertheless, as is clear from some of the observations we have made in this decision, the Authority could perhaps be more helpful when it is clear that a firm is struggling with the complexity and opaqueness of some of the regulatory provisions and give a clear steer as to what matters fall within the scope of the Authority's regulation and which do not. We note, for instance, that the perimeter guidance from the Authority is somewhat limited when it comes to consumer credit related activities. It is not always an answer simply to tell the firm that it can obtain legal advice. In our experience there are very few legal firms with the necessary specialists who have detailed knowledge of these

provisions from whom advice can be obtained by the average small firm at reasonable cost. We do, however, understand the resource constraints within which the Authority had to operate in processing a large number of applications resulting from the transfer of responsibility for regulation of consumer credit from the OFT. We also acknowledge that with the numbers involved, it necessarily had to be largely paper-based exercise, although a face-to-face meeting or telephone conference might have resolved the issues that arose in this case. In the absence of face-to-face contact, the quality of information the Authority makes available to firms takes on a greater importance.

Disposition

162. The reference is dismissed. Our decision is unanimous.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 7 November 2016